

May 3, 2004

Ms. Frances M. Hart
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
Tenth Floor
1801 L Street, NW
Washington, DC 20507

Dear Ms. Hart:

ORC Worldwide (ORC) submits these comments on the proposed “Agency Information Collection Activities: Adoption of Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as They Relate to the Internet and Related Technologies” (Interpretive Guidance), which notice was published on March 4, 2004 in the *Federal Register* at 69 *Fed.Reg.* 10152-10158.

ORC Worldwide

ORC Worldwide is an international management consulting firm specializing in human resources. Senior managers and corporate labor and employment counsel from more than 200 *Fortune* 500 companies participate in networks and other activities sponsored by ORC in order to improve compliance and management systems and practices in the areas of equal employment opportunity, affirmative action and diversity, as well as labor and employment law. The following comments, however, are solely those of ORC and may differ from the views of individual participating companies.

General

ORC applauds the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), Department of Justice (Justice), and the Office of Personnel Management (OPM) on their efforts to address the “issue of how use of the Internet by employers to fill jobs affects employer recordkeeping obligations”¹ and to “evaluate the need for changes to the questions and answers accompanying the Uniform Guidelines necessitated by the growth of the Internet as a job search mechanism”² as requested by the Office of Management and Budget (OMB) in 2000. ORC also appreciates the efforts of the OFCCP in its proposed rule to amend “its recordkeeping requirements for compliance monitoring and other enforcement purposes to conform to the new interpretative guidance promulgated by the UGESP agencies” which notice was published on March 29, 2004 in the *Federal Register* at 69 *Fed.Reg.* 16446-16450.

Most of ORC’s members are federal contractors and will be required to comply with the requirements set forth in both the Interpretive Guidance, as well as the OFCCP’s proposed rule. They will also be required to comply with the existing Uniform Guidelines on Employee Selection Procedures (UGESP), which have not changed as a result of the Interpretive Guidance. Since all three set forth recordkeeping requirements that will directly impact nearly every ORC member, ORC will address the OFCCP’s proposed rule and the UGESP as appropriate in this comment letter.

Overview

There were several positive aspects incorporated into the Interpretive Guidance, for which ORC is most appreciative. First, the “Introduction” was very helpful in recapping the long history of the UGESP and the subsequent clarifying guidance released in 1979 and 1980. ORC feels a special connection to the UGESP having published an analysis of it in September 1978³ when it was first released. Peter C. Robertson, who was then the Director, Office of Policy Implementation, with the EEOC served as the designated contact for the UGESP. He subsequently came to work for ORC and headed up its Equal Opportunity Group, the same group whose views are now represented in these formal comments by an entirely new generation of EEO and affirmative action compliance specialists from many of the same companies.

Additionally, the section on the “Background: Internet Recruiting” was also a very comprehensive summary on various aspects of Internet recruiting. It underscored some of the complexities employers face in managing the applicant definition and recordkeeping issues within their companies.

The proposed Interpretive Guidance has responded to many of the concerns employers have had. However, there are a number of issues raised by the proposal. The following comments will highlight these improvements, point out the issues and make specific recommendations based on the concerns of employers.

1. Employers need a single applicant definition.

a. There should be a common definition of an “Internet Applicant” between the EEOC and OFCCP.

ORC strongly recommends there be one single applicant definition between the EEOC and OFCCP. If it is implemented in its current form, employers who are federal contractors will also be required to comply with *two* widely divergent definitions of an “Internet Applicant”. For example, employers who are federal contractors will be required to comply with the proposed Interpretive Guidance and the proposed OFCCP rule. (Reference Enclosure 1). To the extent there are two different definitions employers will have different processes to comply with the different definitions, creating substantial burdens on employers’ systems, causing organizational inefficiencies in having two different processes, and causing needless confusion when dealing with the EEOC and OFCCP over enforcement issues involving the same kind of records.

b. There should be a single standard for “Internet Applicants” and “Paper Applicants”.

ORC also strongly recommends that the EEOC and OFCCP define an applicant in the same way regardless of whether the applicant has applied online (Internet Applicant) or by other more traditional means, e.g, in-person visit, hard copy submission via U.S. mail (Paper Applicant). In addition to the complexity of having two different definitions of an Internet applicant between the EEOC and the OFCCP, all employers, regardless of their federal contractor status, must still comply with the existing UGESP.

While the initial reason for defining an Internet Applicant was due in part to the large volume of job seekers submitting resumes online, a more specific definition responds equally to the need to have a meaningful and manageable process for Paper Applicants. Notwithstanding the supplemental questions and answers issued in 1979 and 1980⁴ to clarify and interpret the UGESP, there has continued to be a lack of common understanding and specificity in the definition of applicant. This has resulted in years of unproductive efforts and debate between employers and, in particular, the OFCCP, regarding how an applicant is defined, what records must be kept, and when race and gender is solicited.

Q&A No. 15, which was left unchanged in the proposed Interpretive Guidance, states the definition of “Paper Applicants”. While it is likely there are some employers that have moved totally to electronic recruitment and selection, certainly many more companies use some kind of combination between electronic and paper. Consequently, federal contractors will need to comply with three separate and distinct applicant definitions: proposed Interpretive Guidance, proposed OFCCP Rule, and the existing Q&A No. 15. Non-federal contractors will be required to comply with two separate and distinct applicant definitions: the proposed Interpretive Guidance and the existing Q&A No. 15. This makes no sense. It creates an unacceptable cumulative burden requiring employers to develop two or three different systems and internal requirements for the **same** recruitment and selection process.

Certainly, OMB contemplated that it might be necessary to make changes to the existing questions and answers accompanying the UGESP when in 2000, it instructed the EEOC “*to evaluate the need for changes to the questions and answers accompanying the Uniform Guidelines necessitated by the growth of the Internet as a job search mechanism.*”⁵ (Emphasis added). Consequently, ORC recommends appropriate changes be made to the applicable existing questions and answers so there is one common definition of an applicant with no distinction between Internet Applicants and Paper Applicants.

c. A common definition will minimize the burden on employers.

With a common definition, employers would be able to increase productivity and reduce both costs and administrative burden by modifying or developing one system to capture and maintain records of race and gender for both Internet and Paper applicants. For example, a process could be set up whereby Paper Applicants are invited to self-identify and their submission could then be electronically scanned and stored in the same system used to capture and maintain self-identification of Internet Applicants. Implementation of a single definition and process would be easier as would compliance training for managers and Human Resource specialists as well as monitoring for compliance.

2. *The applicant definition in Question and Answer No. 96 in the Interpretive Guidance should explicitly incorporate the concept of “minimal qualifications”.*

a. “A click does not an applicant make”.

The three requirements outlined in the answer to question 96 for an individual to be an applicant under the Interpretive Guidance (reference Enclosure 1) are a positive step in the right direction. They attempt to clarify that not all job seekers become an “applicant” by merely forwarding a resume or personal profile via the Internet or related technologies, e.g., “a click does not an applicant make”. And each requirement also sets forth very helpful examples and illustrations of just what the agency intended each requirement to mean.

ORC members are satisfied with this proposal as far as it goes. However, they are concerned that it does not directly address the very serious problem that job seekers who do not possess the minimal qualifications of the job in question must now be counted as applicants. This would occur under the proposed applicant definition set forth in Q&A No. 96 because there is no explicit requirement that the applicant must have the minimal qualifications for the position in question.

The proposed Interpretive Guidance suggests in the example explaining Q&A No. 97 that a minimum qualification (e.g., two years of printing experience) requirement is part of the applicant

definition when not applying for a specific open position. Certainly, employers will likely make that interpretation. However, ORC strongly recommends that the minimal qualification be incorporated explicitly into the Interpretive Guidance, which would be consistent with how it is directly addressed in the Proposed OFCCP Rule under § 60-1.3(1)(iii), [t]he individual's expression of interest indicates the *individual possesses the advertised, basic qualifications for the position*" (emphasis added). A simple way of incorporating this concept would be to revise the third requirement of the definition under Q&A No. 96.

Current: "The individual has indicated an interest in the particular position"

Proposed: "The individual has indicated an interest in the particular position *for which the individual possesses the advertised, basic qualifications for the position*" (emphasis added). Incorporating the Proposed OFCCP's Rule explicit minimal qualification language would insure consistency between the Interpretive Guidance and the OFCCP. It would be consistent with the requirement under Title VII that plaintiffs show they are "minimally qualified" as part of the prima facie case.

3. *The distinction between "recruitment" and "selection" must be clarified.*

ORC supports the distinction between recruitment and selection contained in the Interpretive Guidance Q&A No. 95. This distinction makes the process of searching databases exempt from the UGESP monitoring requirement because it is not a selection practice. Consequently, any searches - initial or subsequent - should create job seekers/potential recruits to contact – not applicants.

However, employers and the agencies still need a "bright line" between recruitment and selection. While the proposed Interpretive Guidance attempts to address the difference, ORC recommends the EEOC provide additional clarification as set forth below.

a. The bright line should be when the job seeker is considered for a particular position.

ORC recommends the line between recruitment and selection be drawn when the employer actually "considers" a job seeker for a particular position. Building on ORC's recommendation in section two above, "considering a job seeker" for a particular position would also mean comparing the resume against the advertised qualifications to determine if the job seeker meets the minimum qualifications for the advertised position, not simply comparing the contents of the resume against the advertised job via an electronic key word search. "Considering a job seeker" might also include inviting the individual to complete an employment application as the "first step" in an employer's selection process. Prior to "consideration", an individual might only have submitted a resume or an on-line profile to an employer.

The distinction between recruitment and selection can be illustrated as follows:

Recruitment

Advertise job

Establish procedures for submitting applications

Iterative word searches on sub-missions or resumes already in the database

Potential recruits identified

Selection

Consider identified recruits who have met the rest of the “applicant” criteria, including meeting basic minimum qualifications for the position

Make “go/no go” decisions

b. Incorporate “act of consideration” into Q&A No. 97.

ORC also recommends that Q&A No. 97 be modified to include the concept of the “act of consideration” as a distinguishing factor for when search criteria would become subject to disparate impact analysis. The “act of consideration” would be the first step in the selection process after the potential recruits have been identified through the recruitment process.

c. Incorporate “act of consideration” into Q&A No. 96.

The phrase, “The employer has acted to fill...” in Q&A No. 96 (1) is ambiguous. The phrase could mean many things from posting a job to fulfilling all of the employer’s typical recruitment and selection processes. Consistent with the argument above, ORC recommends this phrase should be revised to incorporate the concept of “consideration” of the individual for the particular position.

4. *The proposed Interpretive Guidance should clarify when employers collect race and gender data.*

ORC recommends the agency clarify when employers are required to collect race and gender data under the proposed Interpretive Guidance. In its current form, the guidance only indirectly in Q&A 97 raises the race and gender issue in the context of disparate impact analysis.

Additionally, the current requirement is for individuals to provide race and gender data on a voluntary basis. As long as individuals can voluntarily choose whether to provide race and gender data, employers are limited to provide that data which individuals provide to them. And because employees and applicants sometimes misinterpret why employers are requesting race and gender data, ORC recommends the agency provide standard language that employers can use when they solicit race and gender data.

5. *Clarification is required on using Census or workforce data in disparate impact analysis.*

Q&A No. 97 states that all the search criteria that employers use are subject to disparate analysis. It goes on to say that “[d]isparate impact analysis can be based on Census or workforce data.” Many employers have expressed concerns about what this statement means. In general, employers are concerned that to *require* them to conduct disparate impact based on Census or workforce data would

be unreasonable and burdensome, if required in addition to an analysis of hires to actual applicant flow. Census and workforce data are not necessarily reflective of current market conditions and consequently it may not provide a valid snapshot of the currently available and viable applicant base.

Further, without the race and gender demographics from applicants who choose not to self-identify, employers will be at a significant disadvantage to respond to government challenges that their applicant slates are statistically below “a government-defined labor force availability.” Given the limited disclosure of race/ethnicity and gender from applicants, ORC discourages the use of the Census or workforce data as either a substitute for the applicant data or as an assessment of the appropriateness of the applicant pool or the success of an employer’s recruitment practices.

Employers, who are federal contractors, have carefully conducted analyses of their workforce as compared to available minority and female talent, considering representation of internal candidates, along with external occupational data from the U.S. Census to determine if representation in the company’s workforce, by employer-defined job groups, is below availability of skilled internal/external minority and female talent. The proposed Interpretative Guidance does not make any reference to skill or occupation based Census and workforce data being used in the “disparate impact analyses”. Therefore, this is another reason why this approach is not recommended as an appropriate assessment tool.

6. *The proposed Interpretive Guidance will require substantial lead-time to implement.*

When setting an implementation date for the new Interpretive Guidance, the agency must give due consideration to the amount of time and cost for companies to make the necessary human resource information system modifications to meet these new requirements. Many employers that operate on a calendar cycle will be completing their 2005 budgets in the summer/early fall of 2004. As a result, the proposed Interpretive Guidance will need to be finalized by this summer and include sufficient time to implement or the effective date may need to be extended into 2006 or even 2007. And depending on the size and resources of the company involved, even more time may be needed to implement these changes.

Additional support for the need for sufficient lead time to implement the anticipated Interpretive Guidance is the added burdens on companies from having to (1) implement the EEOC’s final rule on revised EEO-1 form reporting; and (2) implement the OFCCP’s final rule on Internet Applicants, assuming the EEOC and OFCCP continue to require companies to comply with two differing standards for what constitutes an applicant. As of this date, the EEOC has still not released its long-awaited final rule that will significantly revise the current EEO-1 forms. As a result, companies have not yet begun to make the system changes to accommodate this rule.

Consequently, ORC recommends that any changes the EEOC makes to the EEO-1 form in its final rule should be implemented simultaneously with the implementation of the final Interpretive Guidance so that all systems modifications and communications can be made on a “once and done” basis. This process will, of course, be much simpler for employers if there is only one single applicant definition. As stated previously, that definition should incorporate the concept of “minimal qualifications”, which will substantially decrease the cumulative burden for employers in implementing the proposed Interpretive Guidance and OFCCP final rules.

7. ***The proposed Interpretative Guidance will create a burden to employers.***

a. *Proposed Interpretive Guidance is not the “silver bullet”.*

ORC takes exception to the statement: “With respect to paperwork burden, the Additional Questions and Answers would present a solution to problems employers currently face in applying the Guidelines on Employee Selection Procedures in the context of the Internet and related technologies. Therefore, the Additional Questions and Answers would not involve an increase in paperwork burdens associated with attempts to apply existing guidelines to the context of the Internet and related technologies.”

First, while the proposed Interpretive Guidance is helpful in clarifying the definition of an applicant in the context of the Internet and related technologies, it is not a “silver bullet”. There are still some important areas that require express language, such as minimal qualifications, to alleviate the pattern of confusion over the meaning of an applicant and the recordkeeping requirements. Second, the statement of burden ignores the costly computer system reprogramming that employers will need to make to comply with this proposal.

b. *The proposed Interpretive Guidance will impose a storage burden on employers.*

Many employers are concerned about the storage requirements created by the proposed Interpretive Guidance. With a requirement to maintain for two years all applications submitted under Q&A No. 96 and to maintain all expressions of interest under Q&A No. 97, the amount of computer storage space required may be substantial. The other issue is in what format must these records be maintained, particularly for those who expressed interest, but who were not selected. The amount of storage space for these documents could be quite substantial. The level of burden is also impacted by what records should be maintained and for how long with respect to Q&A Nos. 96 and 97. In short, the proposed Interpretive Guidance represents a substantial, but unacknowledged burden for employers, which should be considered prior to finalization of the guidance. As stated previously, the burden will increase substantially if employers are required to comply with three separate and distinct applicant definitions for which different documents must be maintained.

c. *The estimate of the burden to implement the proposed Interpretive Guidance appears highly speculative.*

ORC believes the estimate of burden is highly speculative and substantially understates the actual burden on employers. The proposed burden estimate implicitly assumes that companies will be able to simply “press a button” and the Human Resource Information Systems (HRIS) in large complex corporations, small or mid-size employers, or at third-party vendors will be able to automatically comply. This is simply not true. It ignores the complexities created by different applicant definition requirements between the proposed Interpretive Guidance, the proposed OFCCP Rule, and the existing Q&A No. 15 for Paper Applicants.

Conclusion

ORC would like to thank the Commission for the opportunity to comment on this proposal. It especially appreciates the complexities of dealing with this issue across agency lines, and the effort to move the discussion this far. As set forth above, ORC believes the Commission has several issues to address and questions to answer for employers before this proposal can be finalized.

Sincerely,



Patricia A. Schaeffer
Vice President
ORC Worldwide

¹ 68 *Fed.Reg.* 10153

² 68 *Fed.Reg.* 10153

³ "Analysis of Uniform Guidelines On Employee Selection Procedures, ORC Equal Opportunity Group, September 1978.

⁴ 44 FR 11996, March 2, 1979 and 45 FR 29530, May 2, 1980

⁵ 69 *Fed.Reg.* 10153

Enclosure 1

Issue	Proposed Interpretive Guidance 69 Fed.Reg. 10152-10158 Q&A No. 96 (Summarized)	Proposed OFCCP Rule 69 Fed.Reg.16446-16450 §60-1.3 (Summarized)	Uniform Guidelines on Employee Selection Procedures Q&A 15 (Summarized) ¹
Definition of an applicant	<ol style="list-style-type: none"> 1. Employer has acted to fill a particular position; 2. The individual has followed the employer's standard procedures for submitting applications; and, 3. The individual has indicated an interest in the particular position. 	<ol style="list-style-type: none"> 1. Job seeker has submitted an expression of interest in employment through the Internet or related electronic technologies; 2. Employer considers the job seeker for employment in a particular open position; 3. Job seeker's expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and, 4. Job seeker does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual 	<p>15.Q. What is meant by the terms "applicant" and "candidate" as they are used in the Uniform Guidelines?</p> <ol style="list-style-type: none"> 1. Depends upon the user's recruitment and selection procedures; 2. Person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. 3. Interest may be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice.

¹ A. The precise definition of the term "applicant" depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest may be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice. The term "candidate" has been included to cover those situations where the initial step by the user involves consideration of current employees for promotion or training, or other employment opportunities, without inviting applications. The procedure by which persons are identified as candidates is itself a selection procedure under the Guidelines. A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an applicant or candidate for purposes of computing adverse impact. Employment standards imposed by the user which discourage disproportionately applicants of a race, sex or ethnic group may, however, require justification. Records should be kept for persons who were applicants or candidates at any stage of the process.